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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 532

CARL F. KORTEPETER

v.

THE UNITED STATES OF AMERICA

No. 533

GURNEY G. DERBYSHIRE

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 220–227) is reported in 114 F. (2d) 124.

JURISDICTION

The judgment sought to be reviewed was entered July 22, 1940 (R. 227), and a petition for rehearing was denied September 24, 1940 (R. 229). The petition for writs of certiorari was filed October 29, 1940. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

The principal question presented is whether there was sufficient evidence to warrant the submission to the jury of the third count charging a conspiracy to defraud the United States by unlawful diversion of W. P. A.[1] funds and labor.

A subsidiary question is whether reversible error resulted because of the trial court's failure to rule as a matter of law upon the interpretation of a series of W. P. A. instruments in connection with the issue whether the work was authorized with respect to which the W. P. A. funds and labor were alleged to have been unlawfully diverted.

STATUTE INVOLVED

U. S. C., Title 18, Section 88 (Criminal Code, Section 37) insofar as pertinent, provides:

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[1] The Works Progress Administration will be generally referred to as W. P. A.

> If two or more persons conspire * * * to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

The third count of the indictment charged petitioners with conspiring to defraud the United States by the unlawful diversion of W. P. A. funds and W. P. A. labor paid from W. P. A. funds in the construction of roads upon certain unimproved real estate owned by the petitioner Derbyshire in Marion County, Indiana (R. 3–13).[2]

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[2] Counts one and two of the indictment (R. 1–2) were based on Section 19, Title I, of the Emergency Relief Appropriation Act of 1938, c. 554, 52 Stat. 809, 814–815. This section provides, in part, that "Any person who knowingly and with intent to defraud the United States * * * diverts, or attempts to divert or assists in diverting, for the benefit of any person or persons not entitled thereto, any portion of such appropriation, or any services or real or personal property acquired thereunder * * * shall be deemed guilty of a misdemeanor and fined not more than $2,000 or imprisoned not more than one year, or both." Both petitioners were convicted upon all three counts of the indictment (R. 102). The petitioner Derbyshire was sentenced generally to imprisonment in a penitentiary for a year and a day and fined $1,000 and the petitioner Kortepeter was sentenced generally to imprisonment in a reformatory for 18 months and fined $1,000 (R. 158–159). Feeling that these sentences could not be sustained under the first and second counts, charging misdemeanors, the Government conceded in its

1. By the Emergency Relief Appropriation Act of 1937, c. 401, 50 Stat. 352, 353, the expenditure of $1,500,000,000, together with the expenditure of certain unexpended balances of prior appropriations, was authorized during the fiscal year ending June 30, 1938 "in order to continue to provide relief, and work relief on useful public projects, in the United States and its Territories and possessions." It was provided that the appropriation would be available "for the following classes of public projects, Federal and non-Federal, and the amounts to be used for each class shall not * * * exceed the respective amounts stated, namely: (a) Highways, roads, and streets, $415,000,000 * * *." Appropriations for similar purposes were made in the Emergency Relief Appropriation Act of 1938 (52 Stat. 809).

In both Appropriation Acts it was provided that no non-Federal project shall be undertaken or prosecuted unless and until the sponsor has made a written agreement to finance such part of the entire cost thereof as is not to be supplied from Federal funds (50 Stat. 353; 52 Stat. 811).

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brief in the Circuit Court of Appeals (p. 42) that it would have to uphold the sentences under the third or conspiracy count. While this concession would appear to be warranted as to Derbyshire, who was sentenced to imprisonment in a penitentiary, it is not entirely clear that the concession was required to be made as to Kortepeter, who was sentenced to a reformatory. Since, however, the Government feels that the sentences as to both petitioners can be sustained under the conspiracy count, it deems it unnecessary to give consideration to the misdemeanor counts.

On March 16, 1937, the Board of County Commissioners for Marion County, Indiana, submitted to the Works Progress Administration for the Sixth District, which consisted of Marion County, its written Project Proposal, in which it requested the review thereof and that a formal application be made for the allotment of WPA funds in the amount of $828,518 for the conduct, prosecution and operation of the project therein described. This project was stated to be the construction of approximately 100 miles of bituminous macadam roadways and the construction and reconstruction of approximately 50 miles of gravel roadways in Marion County. It was agreed that the project would be conducted only on property owned by Marion County. In justification of the proposal it was stated that the bituminous asphalt work would complete a hard-surfaced belt highway in Marion County 150 miles long, and that the other work would consist of repairing and rebuilding 50 miles of farm-to-market roads, recent floods having seriously damaged many bituminous and gravel roads. It was also specifically stated that the proposed project was intended for the use & benefit of the public. The proposal contained a "breakdown" of estimated costs, including the amounts and percentages to be contributed by the Federal Government and by Marion County. On the same day the petitioner Kortepeter, who was then W. P. A. Assistant Supervisor of Operations

in Marion County (R. 20), signed a Project Application, which likewise was signed by the Indiana State Administrator of W. P. A. on April 5, 1937, requesting the allocation of W. P. A. funds for the proposed project. This application described the project in the same language as the proposal. In the application it was stated that no improvements would be made on private property. On July 17, 1937, the President approved the project and allotted the sum requested, the project being known as Official Project No. 465–52–1–15.[3] (Defts.' Ex. E, II, R. 471–486).[4]

On March 15, 1938, the County Comissioners of Marion County submitted to the Works Progress Administration a second Project Proposal supplementing the first and requesting that an applica-

[3] Projects, to be accepted by W. P. A., have to be sponsored by some governmental unit, such as a city, county, or township (R. 66). Projects in Marion County were initiated by the "proposal" executed by the governmental sponsor, but this proposal was actually prepared in the Operations Department of W. P. A. under Kortepeter's supervision. The proposal and the second necessary instrument—an application signed by Kortepeter and the State Administrator of W. P. A.—were then sent to Washington for approval, and were the basis of the "Presidential letter" authorizing the project (R. 18, 67, 73, 221).

[4] The record in this case consists of one bound printed volume, numbered from page 1 to page 237, and one unprinted volume of exhibits the pages of which are individually numbered from 296 to 506, inclusive. Consistent with the practice followed by the petitioners (Pet. 2, footnote), the printed volume is referred to herein as "R" while the unprinted volume is referred to as "II R."

tion be made for the allotment of $1,005,959 for the conduct, prosecution and operation of the project described therein, which was the repair and improvement of county roads throughout Marion County. This proposal contained the usual "break-down" of estimated costs. In justification of the proposal it was stated that supplemental funds were needed because of the approved extensive additional plans for a greatly enlarged farm-to-market highway system throughout the County. The project application in connection with this proposal was signed by Kortepeter, who, at that time had become W. P. A. Supervisor of Operations and Coordinator (R. 20), on April 7, 1938, and by the State Administrator on April 20, 1938. The description of the project in the application followed that of the proposal, and on May 9, 1938, the President approved the project and allotted the funds requested (Defts.' Ex. F, II R. 488–503).

On June 17, 1938, a third Project Proposal was submitted by the County Commissioners of Marion County with the request that the Works Progress Administration apply for an allotment of $2,187,-179 for the conduct, prosecution, and operation of the project therein described. This proposal, which was couched in much the same language as the second one, stated that the project involved the repair and improvement of county-owned roads at various locations throughout Marion County, including widening, filling, grading, draining, side

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ditching, berming, surfacing, clearing, resetting fences, and landscaping; widening and constructing small bridges, culverts, and other structures; painting bridges; and performing appurtenant work. In justification of the proposal it was stated that during the Spring considerable damage had been caused to many miles of bituminous and gravel roads by heavy rains which washed out many of the shoulders and portions of the roads, and in some parts of the County even the entire roadbed; that the work proposed would provide a hard-surfaced belt only on farm-to-market highways in the County; and that in the reconstruction and rebuilding of these roads it was planned to widen them as well as the culverts and bridges included in the right-of-way. In this proposal, as in the other ones, there was a "break-down" of estimated costs. The proposal also contained a list of the 59 streets and roads upon which repair or improvement was contemplated and the precise mileage involved, even to fractions of miles (Gov. Ex. 2, II R. 298–313).

Kortepeter signed the project application on June 30, 1938, and it was signed by the State Administrator on July 11, 1938. The application described the project in the terms of the proposal. It was stated in the application that no improvements would be made on private property but only upon property owned by the County, and that the application provided for a continuation of work

formerly approved (Gov. Ex. 3, II R. 315–317). The President approved the project and allotted the sum requested on August 12, 1938 (Gov. Ex. 4, II R. 319–321). The project bore a new number (No. 65–52–1–36).

On July 15, 1938, the Indiana Administrator of W. P. A. transmitted to District Directors and Supervisors Indiana State Bulletin No. 103 (Gov. Ex. 68, II R. 327), to which was attached W. P. A. General Letter No. 190, issued from Washington on July 12, 1938 (Gov. Ex. 69, II R. 329). This Bulletin, referring to the General Letter, stated:

I. GENERAL LETTER NO. 190

1. General Letter No. 190, copy attached, is hereby made a part of the Indiana procedure.

II. IMPROVEMENT TO STREETS AND UTILITIES IN UNDEVELOPED AREAS

1. It shall be noted that the improvement to streets and utilities in undeveloped areas where the abutting property is in the hands of a real estate firm or a small number of individuals is inelegible. This means that such work cannot be prosecuted on approved projects operating or to be operated, and such work shall not be included in project applications.

III. CONTROL

1. It shall be the responsibility of the District Office to insure absolute compliance with all the provisions of this bulletin.

2. In 1938, and for a number of years prior thereto, Derbyshire was the owner of an unimproved 14-acre tract of farm land in Marion County, Indiana (R. 15, 23, 55). In 1924, Derbyshire had this land surveyed and a plat prepared showing the subdivision of the land into residential lots, with several roads or streets. He did nothing further, however, at this time (R. 55, Defts.' Ex. D, II R. 469).

Kortepeter, the son-in-law of Derbyshire, was employed in July 1935, by W. P. A. as Supervisor, Division of Projects and Planning, in Marion County. In August, 1937, he became the Supervisor of Operations and Coordinator for W. P. A. in Marion County, and continued in that position until his services terminated in February, 1939. Kortepeter was the highest ranking officer of W. P. A. in Marion County, and had charge of the operation and conduct of W. P. A. activities in that County (R. 20). One of his duties was "to work up and get different types of projects that relief labor could work on" (R. 66).

Derbyshire, at a date not definitely fixed, but probably in May or June, 1938 (R. 23), consulted Kortepeter as to whether W. P. A. would build some roads on the former's property, and was told that before the work could be undertaken Derbyshire would have to have a plat made of the property and dedicate the proposed roads or streets to the County (R. 52, 68). Under Kortepeter's

supervision a plat of the land was made (Defts.' Ex. A, II R. 465) and a purported dedication, dated September 3, 1938, prepared (Defts.' Ex. B, II R. 467). While the land was surveyed by an engineer of W. P. A., at Kortepeter's request, the engineer did not perform this service as one of his official duties (R. 23–25). The plat showed two roads upon the property but, unlike the 1924 plat, did not subdivide the property into residential lots. Although a copy of the "Highway Dedication Plat," produced in court by the petitioners, bore the inscription "Approved this 8th day of September, 1938" and the signatures of the County Commissioners (Defts.' Ex. A, *supra*), it was stipulated that neither the plat nor the alleged dedication were on file or of record in the office of any officer in Marion County (R. 15).

Upon Kortepeter's order, the construction of two roads, known as Fable Road and Loretta Avenue, was undertaken by W. P. A. labor on Derbyshire's land, beginning in November, 1938. These roads were not included in the list of 59 streets and roads contained in the proposal of June 17, 1938 (*supra,* pp. 7–8). In addition to equipment, the services of 40 or 50 men were utilized in the work, which continued until it was ordered stopped by W. P. A. officials in February 1939. The property on which the work was carried on was "empty, unimproved land" (R. 28, 30), and one of the roads apparently ran through an apple orchard and

stopped at a fence (R. 54). The cost of the W. P. A. operations on Derbyshire's land was about $10,000 (R. 46), and it was testified by Kortepeter that this money was paid from the funds allotted by the Presidential letter of August 12, 1938, *supra,* p. 9 (R. 78). Derbyshire testified that no one else could use the roads except the owner of the land, who was himself, and that the roads would materially increase the value of his land. He explained that the reason he seized upon the opportunity to build the roads at the time was that "If they [W. P. A.] could do that and make me that present, I would be foolish not to accept it" (R. 55).

ARGUMENT

1. Petitioners argue, in effect, that the two roads which were constructed on Derbyshire's land with WPA funds and labor came within the purview of authorized work. There is clearly no basis for any such contention.

Petitioner Kortepeter admitted in his testimony that the funds used in doing this work were allotted by the Presidential letter of August 12, 1938 (R. 78), the one approving the project proposal submitted by the Board of County Commissioners of Marion County on June 17, 1938, and awarding the sum requested in such proposal (*supra,* pp. 7–9). That proposal and letter, as explained in detail by the Circuit Court of Appeals (R. 222–223), did not

contemplate the construction of any new roads, but only the repair and improvement of existing county-owned roads.

Moreover, the proposal specifically listed some 59 streets or roads upon which repair or improvement was contemplated. The roads constructed on Derbyshire's land were not included in this list. The proposal, in requesting the allotment of a specific sum from W. P. A., also contained a "break-down" of the estimated costs of the repair and improvement work for which funds were requested, including the amounts and percentages to be contributed by the Federal Government and by Marion County, and the precise sum requested was allotted by the President.

The project in question must, therefore, have contemplated no work other than that defined therein. Indeed, Indiana State Bulletin No. 27 (Gov. Ex. No. 70, II R. 455), dated October 28, 1935, long prior to the work done on Derbyshire's land, specifically states that Presidential approvals are "for only the specific purposes outlined in the project proposal." The acceptance of the petitioners' contention would permit local W. P. A. officers, after the Presidential approval of the sponsor's proposal, to initiate new and inconsistent projects not contained in the approved proposal, without the requisite sponsorship of a governmental unit, without any estimate or "break-

down" of costs, and without any agreement on the part of the governmental unit to bear its share of the costs as required by statute.

Not only were the funds allotted by the President for the project to be expended for the repair and improvement of existing roads, not the construction of new roads, but it is apparent that the roads constructed on Derbyshire's land were not of the character with which the project was concerned. The proposal for that project, as well as the earlier project proposals referred to in the Statement (*supra,* pp. 5–9), make it clear that the roads upon which the work was to be done formed a part of an extensive farm-to-market highway system in Marion County. "By no stretch of liberal interpretation," as the Circuit Court of Appeals said, "could the two roads or lanes here involved * * * be considered as part of any such highway system." (R. 223.) The work contemplated by the project was obviously work which was to be done for the benefit of the public as a whole, and not solely for the benefit of individual land owners. Indeed, the Appropriation Act pursuant to which funds were made available specifically required that the projects on which the money was to be expended be "useful public projects." Here the work enured to the benefit of the owner of a tract of land which had not yet been subdivided, and the work admittedly benefited no one but himself. Not only was this work not con-

templated by the project proposal and the Presidential letter of authorization, but it was contrary to specific instructions which had been issued four months prior to the execution of the work. Indiana State Bulletin No. 103, quoted at p. 9, *supra*, expressly forbade the improvement with W. P. A. funds of streets and utilities in undeveloped areas where the abutting property is in the hands of a real estate firm or a small number of individuals and it specifically stated that "such work cannot be prosecuted on approved projects operating or to be operated." The Derbyshire property was owned by Derbyshire alone.

Petitioners rely, however (Pet. 12, 19, 21), upon a general heading typed on the top of several pages of the Presidential letter of July 17, 1937 (Defts.' Ex. E, II R. 484–486, *supra*, p. 6), emphasizing the word "construct" therein and the permission that the work authorized could be done "upon property where the necessary leases or easements will be * * * obtained by local authorities." They say this language permitted the construction of new roads and precluded the limitation of the Presidential authorization to existing roads and farm-to-market highways. From this, plus the fact that later project proposals were supplements to and continuations of the broad highway program referred to in the earlier proposal, the petitioners apparently spell out the ultimate conclusion that the work on Derbyshire's land was authorized.

The petitioners' argument, however, overlooks the fact that the word "construct" was undoubtedly used in the Presidential letter of July 17, 1937, because the project proposal upon which it was based sought funds not only for the repair and improvement of existing highways, but also for new construction (*supra*, p. 5). It is obvious, too, that the work authorized pursuant to this and the later project proposals did not embrace work of the character here involved, but work in connection with a broad farm-to-market highway system program. Petitioners' argument further ignores the fact that the specific project proposal pursuant to which were allotted the funds diverted, as well as the Presidential letter of authorization of August 12, 1938 (*supra*, pp. 7–9), although in continuation of the farm-to-market highway program, provided only for the repair and improvement of existing roadways.

2. Petitioners also urge that it was the duty of the trial court to construe the various project proposals, applications, and Presidential letters and determine as a matter of law whether the use of W. P. A. funds and labor in the work done upon Derbyshire's land was authorized, and that the court erred in permitting the question of authorization to be determined by the jury. If the abstract principle urged by the petitioners, that the construction of written instruments is a question of law for the decision of the trial court, has any application here, the petitioners clearly were not

prejudiced by the submission of the issue of authorization to the jury. The argument heretofore advanced makes it manifest, we believe, that the trial court would have had to determine that the work done with W. P. A. funds and labor on petitioner Derbyshire's land did not come within the purview of authorized work. The petitioners, consequently, were benefited rather than prejudiced when the trial court permitted the question to go to the jury, and they, accordingly, have no basis for complaint. Cf. *Berger* v. *United States,* 295 U. S. 78, 82.

3. Petitioners also contend that there was a lack of sufficient evidence of intent to defraud the Government on the part of one of the alleged conspirators, Derbyshire, with the result that the conviction of neither can be supported under the conspiracy count. They assert that there was no evidence that Derbyshire had any knowledge of any of the proposals, orders, or bulletins which made the use of W. P. A. funds and labor in the construction of the roads upon Derbyshire's land a fraud upon the United States, and that he acted in good faith by dedicating the roads to the County when he was told by Kortepeter that the work would be legal if he would make such a dedication.

There can be no doubt that Kortepeter knew that a fraud was being committed upon the Government. And while the Government's evidence of knowledge or intent was not so direct as to Derbyshire, there was, we believe, sufficient evi-

dence to warrant the submission of that question to the jury. It may be possible that Derbyshire may not have known of the various documents which made the work done on his land a fraud upon the Government, but, like every other citizen, he was chargeable with knowledge that by statutory direction W. P. A. funds and labor could be used only on useful public projects. He knew also that the expenditure of public funds upon his land could benefit no one other than himself.

It is also significant that although as early as 1924 Derbyshire had considered converting his land into residential property, going so far as to have his land surveyed and a plat prepared showing the subdivision of the land into lots, the character of the land as farm land was in no wise changed when in 1938, acting upon the advice of his son-in-law, Kortepeter, Derbyshire made a purported dedication of the roads on his land to the County. The plat which was then prepared showed no subdivision of the land into residential lots. It is difficult to believe that Derbyshire could honestly have thought that it was proper to use W. P. A. funds and labor for an improvement which would benefit only a single owner of a tract of farm land and would be of no then value to the public generally.

These factors, together with the close family relationship between Derbyshire and Kortepeter,

who was in charge of all W. P. A. operations in Marion County and who obviously was thoroughly conversant with the permitted scope of W. P. A. projects, constituted, we submit, "acts and indubitable inferences therefrom which, if believed, would warrant an inference of fraudulent intent and guilty knowledge * * *." *United States* v. *Holt*, 108 F. (2d) 365, 369 (C. C. A. 7th), certiorari denied, 309 U. S. 672.[5]

The jury and both courts below were in concurrence as to the probative sufficiency of the testimony. No such showing has been made as to require this Court to reexamine the evidence. *Delaney* v. *United States*, 263 U. S. 586, 589–590.

CONCLUSION

The case was correctly decided below. There is involved no important question of Federal law or any conflict of decisions. We therefore respect-

[5] The Government was not required, of course, to show Derbyshire's complicity beyond a reasonable doubt to warrant the submission of the conspiracy count to the jury. It was sufficient merely for it to introduce some substantial evidence of his guilt. *Riddle* v. *United States*, 279 Fed. 216, 222 (C. C. A. 5th), certiorari denied, 259 U. S. 586; *Berlin* v. *United States*, 14 F. (2d) 497 (C. C. A. 3d); *Meyers* v. *United States*, 94 F. (2d) 433 (C. C. A. 6th), certiorari denied, 304 U. S. 583. It is also well settled that on a motion for a directed verdict the Government's evidence must be considered in the light most favorable to it. *Hodge* v. *United States*, 13 F. (2d) 596 (C. C. A. 6th); *Wilson* v. *United States*, 61 F. (2d) 901 (C. C. A. 9th); *Cohen* v. *United States*, 67 F. (2d) 449 (C. C. A. 4th).

fully submit that the petition for writs of certiorari should be denied.

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